RECORD
AND
BRIEFS

Nos. 11-338, 11-347

In The
Supreme Court of the United States

DOUG DECKER, the Oregon State Forester, in his official capacity, *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

GEORGIA-PACIFIC WEST, INC., *et al.*,

Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER, *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF ARKANSAS, *ET AL.*, IN SUPPORT OF THE PETITIONERS

OFFICE OF THE ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-7383
Kendra.jones@arkansasag.gov

**Counsel of Record*
Attorneys for Amici States

DUSTIN MCDANIEL
Arkansas Attorney General
CHARLES MOULTON, ERIC ESTES
Senior Assistant Attorneys General
KENDRA AKIN JONES*
Assistant Attorney General

September 4, 2012

[Additional States Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Library of Congre
Law Library

LUTHER STRANGE
Attorney General
STATE OF ALABAMA
501 Washington Avenue
Montgomery, Alabama 36130

MICHAEL C. GERAGHTY
Attorney General of Alaska
P.O. Box 110300
Juneau, Alaska 99811

PAMELA JO BONDI
Attorney General of Florida
The Capitol, PL-01
Tallahassee, Florida 32399

SAMUEL S. OLENS
Attorney General
STATE OF GEORGIA
40 Capitol Square, SW
Atlanta, Georgia 30334

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720

GREG F. ZOELLER
Indiana Attorney General
Indiana Government
Center South
302 West Washington Street,
5th Floor
Indianapolis, Indiana 46204

DEREK SCHMIDT
Kansas Attorney General
120 Southwest 10th Avenue,
2nd Floor
Topeka, Kansas 66612

JACK CONWAY
Attorney General of Kentucky
COMMONWEALTH OF KENTUCKY
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

JAMES D. "BUDDY" CALDWELL
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, Louisiana 70802

WILLIAM J. SCHNEIDER
Attorney General
STATE OF MAINE
6 State House Station
Augusta, Maine 04333

BILL SCHUETTE
Michigan Attorney General
P.O. Box 30212
Lansing, Michigan 48909

JIM HOOD
Mississippi Attorney General
P.O. Box 220
Jackson, Mississippi 39205

CHRIS KOSTER
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65101

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, Montana 59620

JON BRUNING
Attorney General of the
State of Nebraska
P.O. Box 98920
Lincoln, Nebraska 68509

CATHERINE CORTEZ MASTO
Attorney General for the
State of Nevada
OFFICE OF THE ATTORNEY GENERAL
100 North Carson Street
Carson City, Nevada 89701

MICHAEL A. DELANEY
Attorney General of
New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

ROY COOPER
Attorney General of
North Carolina
DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, North Carolina 27602

MICHAEL DEWINE
Ohio Attorney General
30 East Broad Street,
17th Floor
Columbus, Ohio 43215

E. SCOTT PRUITT
Attorney General of Oklahoma
313 Northeast 21st Street
Oklahoma City, Oklahoma 73105

LINDA L. KELLY
Pennsylvania Attorney General
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

ALAN WILSON
South Carolina Attorney General
P.O. Box 11549
Columbia, South Carolina 29211

MARTY J. JACKLEY
Attorney General
STATE OF SOUTH DAKOTA
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501

ROBERT E. COOPER, JR.
Attorney General of Tennessee
P.O. Box 20207
Nashville, Tennessee 37202

GREG ABBOTT
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol, Suite 230
P.O. Box 142320
Salt Lake City, Utah 84114

KENNETH T. CUCCINELLI, II
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, Washington 98504

DARRELL MCGRAW
West Virginia Attorney General
West Virginia State Capitol
Building 1, Room 26-E
Charleston, West Virginia 25305

GREGORY A. PHILLIPS
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Ninth Circuit's decision that an EPA rule can be invalidated in a citizen suit is incorrect as a matter of law and has negative impacts on each state's regulatory programs	4
II. The Ninth Circuit failed to defer to the EPA's reasonable interpretation of the Clean Water Act	7
A. The Silvicultural Rule	7
B. The 1987 Stormwater Amendments	12
III. The Ninth Circuit's Decision Has Significant Consequences On Existing State BMP And NPDES Programs	15
A. The States' Best Management Practices	15
B. The States' Individual NPDES Programs	19
C. NPDES General Permits Are Not The Solution	23
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Arkansas v. Oklahoma, 503 U.S. 91 (1992) 7

Auer v. Robbins, 519 U.S. 452 (1997) 10, 11, 12, 13, 15

Del. Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3d Cir. 1991) 5

NRDC v. EPA, 966 F.2d 1292 (9th Cir. 1992) 4

STATUTES

Clean Water Act, 33 U.S.C. §§ 1251-1387:

Section 218, 33 U.S.C. § 1298 16

Section 319, 33 U.S.C. § 1329 ..... 1, 16, 18

Section 402, 33 U.S.C. § 1342 ..... 12, 13

Section 502, 33 U.S.C. § 1362 8

Section 502, 33 U.S.C. § 1365 ..... 3, 5, 6

Section 502, 33 U.S.C. § 1369 ..... *passim*

FEDERAL REGULATIONS

33 C.F.R. § 209.120 9

33 C.F.R. § 209.233 9

40 C.F.R. § 122.26 ..... 13, 23

40 C.F.R. § 122.27 ..... *passim*

40 C.F.R. § 124 20

TABLE OF AUTHORITIES – Continued

Page

FEDERAL REGISTER

41 Fed. Reg. 6,282 (Feb. 12, 1976) 3, 9

55 Fed. Reg. 20,521 (May 17, 1990) 9

55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990) 3, 14

73 Fed. Reg. 56,572 (Sept. 29, 2008) 23

77 Fed. Reg. 30,349 (May 23, 2012) 23

77 Fed. Reg. 30,474 (May 23, 2012) 23

OTHER

EPA FY 2012 Budget Hearing Before the Senate Interior, Environment and Related Agencies Subcommittee, 112th Cong. (2011) 22

Florida Division of Agriculture and Consumer Services, *Silvicultural Best Management Practices* (2008) 17

John Gifford, *Practical Forestry* 12 (1907) 9

Letter from Nancy K. Stonger, Acting Assistant Administrator, EPA, to Congressman Kurt Schrader (July 1, 2011) 23

R. Olszewski & C.R. Jackson *Best Management Practices and Water Quality*, National Council for Air and Stream Improvement, Inc. (2006) 17

S. Rep. No. 92-414, 1-11 (1971) 7

TABLE OF AUTHORITIES – Continued

Page

Schilling, E.B., G.G. Ice, T.B. Wigley, and A.A. Lucier, *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, National Council for Air and Stream Improvement, Inc., Research Triangle Park, N.C. (2009).....1, 16, 17

United States Environmental Protection Agency, *U.S. EPA NPDES Permit Writers' Manual*, Office of Water, December, 1996; EPA-833-B-96-003 .....20, 21, 25

United States Environmental Protection Agency, *Protecting the Nation's Waters Through Effective NPDES Permits*, Office of Water, EPA-833-R-01-001, June 2001.....19, 20, 24

INTEREST OF *AMICI CURIAE*

For over three decades, federal and state agencies, courts, and private parties understood that the Environmental Protection Agency's ("EPA") Silvicultural Rule, 40 C.F.R. § 122.27, exempted stormwater runoff from forest roads from the requirement of a National Pollutant Discharge Elimination System ("NPDES") permit, regardless of whether that stormwater is collected via man-made culverts, ditches, or channels. Although Amici States agree that stormwater runoff from forest roads should be managed to minimize the amount of sediment delivered to a state's waters during storm events, Congress recognized that water pollution resulting from these sources is best regulated at a local level. Congress ultimately left it to the states to determine the approaches to non-point source pollution management from forest roads. In that vein, 33 U.S.C. § 1329 requires states to develop programs for non-point source pollution and report to the EPA on the best management practices ("BMPs") that are being used to reduce water pollution from forest roads. *See generally* 33 U.S.C. § 1329.

Amici States have followed Congressional and EPA's directives. Nationally, 16 states have adopted non-point source programs that are regulatory, 22 have non-regulatory approaches, and the remaining states have elements of both. *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Schilling, E.B., G.G. Ice, T.B. Wigley, and A.A. Lucier, National Council for Air and Stream Improvement, Inc., Research

Triangle Park, N.C. (2009). States have worked to ensure individuals and companies that conduct timber harvesting will implement BMPs for forest road construction and maintenance in order to protect water quality and wildlife. The Ninth Circuit's decision effectively invalidates the EPA's Silvicultural Rule by determining that stormwater runoff collected in ditches and culverts is a point source of pollution, rather than a non-point source of pollution. Compounding the problem, the Ninth Circuit further ruled that timber harvesting constitutes an "industrial activity" under Phase I of the EPA's stormwater permit program and the roads that are a necessary component of timber harvests require NPDES permits. If the Ninth Circuit's decision is not overturned by this Court, landowners and loggers will be required to obtain NPDES permits from the EPA or the states. A sudden shift to a fully regulated, permit-based approach to forest road management is a significant departure in how forest roads have been managed for decades under BMPs, and this permit-based approach will further burden state agencies that are already struggling with meeting the current demands of the NPDES program. Forest road stormwater is already effectively managed under state BMP programs, and thus these new burdens will fail to achieve any significant benefit to the environment. Because the Ninth Circuit's decision fundamentally impacts and rewrites existing state programs, Amici States urge this Court to reverse the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

1. The Respondent challenged EPA's Silvicultural Rule in an action brought under the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365. But, a challenge to regulations promulgated by the EPA must be filed pursuant to 33 U.S.C. § 1369, not 33 U.S.C. § 1365. As a matter of law, it is improper to seek to invalidate an EPA rule pursuant to a citizen suit under 33 U.S.C. § 1365.

2. The EPA has consistently maintained that, pursuant to the Silvicultural Rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program." 41 Fed. Reg. 6,282 (Feb. 12, 1976). The Ninth Circuit erred by failing to give deference to the EPA's reasonable, articulated, and longstanding position that forest roads need not be permitted under the NPDES program.

3. Under the later Phase I stormwater program, Congress required stormwater runoff associated with "industrial activity" to be permitted under the NPDES program. Generally, timber harvesting operations required to obtain formal permits are those "engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990). Forest roads do not fit within these categories and were not intended to be regulated under the Phase I program at all. The Ninth Circuit erred by failing to

give deference to the EPA's reasonable, articulated, and longstanding position that forest roads need not be permitted under the NPDES program.

4. Forestry practices in the United States are conducted under the most comprehensive program of BMPs of any land use activity in the nation. Some Amici States employ mandatory BMPs administered by state foresters or forest practice boards or commissions. Other Amici States employ non-regulatory BMPs that are developed or approved by state agencies, together with landowner education to encourage compliance, and authority for agencies to take action against landowners who do not comply. If the Ninth Circuit decision in this case is not reversed by this Court, the states' established BMP programs will be vacated in favor of an NPDES permitting regime, and the burden of NPDES permitting is substantial.

ARGUMENT

I. The Ninth Circuit's decision that an EPA rule can be invalidated in a citizen suit is incorrect as a matter of law and has negative impacts on each state's regulatory programs.

Congress allowed judicial review of EPA rules under the CWA when it provided that "[a]ny interested person" may seek review of an EPA action in approving or promulgating any effluent limitation or other limitation. 33 U.S.C. § 1369. *See, e.g., NRDC v. EPA*,

966 F.2d 1292, 1296-97 (9th Cir. 1992). Review of an EPA rule must be brought within "120 days from the date of such determination, approval, promulgation, issuance, or denial. . . ." 33 U.S.C. § 1369(b)(1). Challenges to EPA rulemakings must be brought in the Circuit Court of Appeals. 33 U.S.C. § 1369(b)(1). Congress provided a separate section in the CWA for individuals to enforce EPA regulations. Under 33 U.S.C. § 1365 a citizen may bring a civil action in district court against any person or agency alleged to "be in violation of (A) an effluent standard or limitation under this subchapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 33 U.S.C. § 1369(a)(2). At its core the purpose of a citizen suit is to enforce regulations, not invalidate them. *Del. Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3d Cir. 1991).

In this case, there is little doubt that Respondent sought to ultimately invalidate EPA's Silvicultural Rule when it filed its citizen suit. The Ninth Circuit permitted review under 33 U.S.C. § 1365, by ruling that the Silvicultural Rule was ambiguous, was susceptible to different readings, and therefore could be interpreted under the CWA's citizen suit provision. Contrary to the Ninth Circuit's reasoning, the Ninth Circuit did not simply "interpret" EPA's Silvicultural Rule. The Ninth Circuit effectively invalidated EPA's Silvicultural Rule. Such a result can be pursued only pursuant to 33 U.S.C. § 1369, not 33 U.S.C. § 1365.

Congress clearly stated its intent to bar challenges to EPA rulemaking in citizen suits by stating that the judicial review provision in 33 U.S.C. § 1369(b)(2) is exclusive. According to Congress, if review of an EPA action "could have been obtained under paragraph (1) [the rulemaking judicial review provision of the CWA] that action "shall not be subject to judicial review in any civil or criminal proceedings for enforcement." 33 U.S.C. § 1369(b)(2). Clearly, Congress required a challenge to regulations promulgated by EPA to be filed pursuant to 33 U.S.C. § 1369, not 33 U.S.C. § 1365.

This suit was brought not as an action against EPA, but instead as an action against the State of Oregon and those entities that owned, built, and maintained forest roads. By determining that EPA's rules may be challenged, and invalidated, in a citizen suit arising under 33 U.S.C. § 1365 rather than 33 U.S.C. § 1369, the Ninth Circuit effectively placed the uniformity of the CWA's NPDES program in jeopardy. Congress' intent to limit challenges to EPA rulemaking to 33 U.S.C. § 1369 has sound underpinnings. In this case, as in the majority of citizen suit cases, EPA was not a named party. Because EPA is not required to be a party to a citizen suit, EPA is not legally obligated to take action if a court overturns or invalidates one of its rules in a citizen suit case. By determining that EPA rules may now be reinterpreted by the court and in effect overturned in a citizen suit, the Ninth Circuit has created a scheme whereby multiple citizen suits, in every state, may be filed in an effort to

challenge an existing, longstanding EPA rule. This, in turn, could result in various interpretations of an identical EPA rule, undermining the uniformity of environmental law sought by Congress by its passage of the CWA. In contrast, if the Silvicultural Rule had been challenged pursuant 33 U.S.C. § 1369, EPA would have been a named party, and would have had to engage in rulemaking to correct any improprieties found by a court. Uniform rulemaking by EPA, with the necessary component of public participation within the rulemaking process, benefits the states, the regulated community and the purpose of Congress' passage of the CWA. This Court should reverse the Ninth Circuit and limit challenges to EPA rulemaking as Congress intended – through the provisions of 33 U.S.C. § 1369.

II. The Ninth Circuit failed to defer to the EPA's reasonable interpretation of the Clean Water Act.

A. The Silvicultural Rule

Congress enacted the CWA in 1972. The CWA provided EPA with the authority to implement a consistent program throughout the U.S. designed to protect the waters of the nation from pollution. *See, e.g., Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (CWA's objective was "authorizing EPA to create and manage a uniform system of interstate water pollution regulation."). Prior to the enactment of the CWA, protection of the waters was handled by individual states. *See* S. Rep. No. 92-414, 1-11 (1971).

The CWA's cornerstone is a permitting requirement for "point source" discharges, *i.e.*, discharges of pollutants through "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft. . . ." 33 U.S.C. § 1362(14). This permitting program is the NPDES permitting program.

The EPA promulgated rules to implement the NPDES permitting program, including rules clarifying when permits were and were not required. One of these rules is known as the Silvicultural Rule. The Silvicultural Rule states:

> (a) *Permit requirement.* Silvicultural point sources, as defined in this section, as point sources subject to the NPDES permit program.
>
> (b) *Definitions.*
>
> (1) *Silvicultural point source* means any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities which are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the United States. *The term does not include non-point source silvicultural activities* such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control,

> harvesting operations, *surface drainage, or road construction and maintenance from which there is natural runoff.* However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material which may require a CWA section 404 permit (See 33 CFR 209.120 and part 233) (emphasis added).

40 C.F.R. § 122.27. Both historically and academically, silviculture – the growing and harvesting of trees – is a recognized agricultural practice. *See, e.g.*, John Gifford, *Practical Forestry* 12 (1907). With the promulgation of the "Silvicultural Rule," the EPA recognized the interconnection between silviculture and agriculture and determined that not all forestry activities were subject to the NPDES program. In 1990, the EPA published a notice in the Federal Register explaining its interpretation of this provision. *See* 55 Fed. Reg. 20,521 (May 17, 1990). In this notice, the EPA stated that stormwater discharges from forest roads, although channeled, do not constitute point sources. *Id.* Instead, these discharges were "caused solely by natural processes, including precipitation and drainage, were not otherwise traceable to any single identifiable source, and were best treated by non-point source controls." *Id.* The EPA has consistently maintained that, pursuant to this rule, "ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 [point source] permit program" 41 Fed. Reg. 6,282 (Feb. 12, 1976).

In its citizen suit Respondent alleged that the Oregon State Forester and private timber defendants were in violation of the CWA because they failed to obtain NPDES permits for stormwater runoff from logging roads that was channeled and collected in ditches and culverts. Accordingly the Ninth Circuit's analysis was limited to that question – whether stormwater from roads associated with the harvesting of timber is a point source that requires an NPDES permit under the CWA. Oregon and the private timber defendants argued that EPA's Silvicultural Rule exempted stormwater runoff from logging roads from the NPDES permitting regime. The EPA filed an amicus brief in the district court in support of Oregon and the private timber defendants supporting Oregon and their position that the Silvicultural Rule exempted stormwater discharges from forest roads from NPDES permits, even if those discharges were channeled.

In *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), this Court held deference to an agency's interpretation of its own regulation, advanced in a legal brief, was warranted unless that interpretation was "plainly erroneous or inconsistent"; conflicted with longstanding practice; or reflected evidence that an agency repeatedly changed its justification for the rule. *Id.* In this case the Ninth Circuit did not conclude that EPA's interpretation of its Silvicultural Rule was not entitled to *Auer* deference. The Ninth Circuit did not disregard EPA's interpretation because it believed that interpretation

conflicted with longstanding practice or EPA had repeatedly changed its rationale for the Silvicultural Rule. Instead, the Ninth Circuit concluded that EPA's Silvicultural Rule could reasonably be read as EPA read it – to exempt stormwater emanating from channeled logging roads from NPDES permits. (Pet. App. 36-37, 43-44).[1] The Ninth Circuit should have followed *Auer* and applied the Silvicultural Rule in a manner consistent with EPA's interpretation of that rule. Instead, the Ninth Circuit found that EPA's interpretation was unknown until it filed its amicus brief, and the EPA Silvicultural Rule conflicted with the CWA.

Despite the Ninth Circuit's claim, Amici States have not wallowed in uncertainty the last 30 years regarding the interpretation and applicability of the Silvicultural Rule. The Silvicultural Rule is clear and unambiguous – that the design, construction, use, or maintenance of forest roads is an activity that does not require an NPDES permit. The intent of the EPA to define these activities as non-point sources and exempted from the NPDES permitting program can be found in both the text of the Silvicultural Rule and its regulatory preamble. Indeed, the EPA's singular position on this topic was acknowledged by the Ninth Circuit, despite its later finding of an alleged ambiguity. The Ninth Circuit stated that, under the Silvicultural Rule, non-point sources, *i.e.*, those that require

---

[1] Cited to Petitioners, Decker, *et al.*, Appendix.

no NPDES permit, included discharges of natural runoff even if such discharges are channeled and controlled through a discernible, confined, and discrete conveyance.

Absent an *Auer* analysis, the Ninth Circuit did not have the leeway to interpret the Silvicultural Rule differently from EPA. And despite Respondent's, and now the United States', insistence that the Ninth Circuit engaged in an interpretation of the Silvicultural Rule the opposite is true. The Ninth Circuit determined the Silvicultural Rule was in conflict with the CWA by stating "we hold that the Silvicultural Rule does not exempt from the definition of point source discharge under § 512914 stormwater runoff from logging roads" that is collected and channelized. (Pet. App. 37). The Ninth Circuit erred by invalidating an EPA rule in a citizen suit. Disguising this rule invalidation as an alternate interpretation that effectively guts the EPA's intent of the rule while leaving the rule standing is a backdoor attempt to avoid the provisions of 33 U.S.C. § 1369, and this Court should reverse.

B. The 1987 Stormwater Amendments

Despite the best of intentions, the NPDES program did not fully eliminate water pollution or return the nation's waters to their pristine state. Recognizing such, Congress passed an amendment to the CWA in 1987. *See generally* 33 U.S.C. § 1342(p). In this amendment Congress mandated a two-phase approach.

Phase I concentrated on five distinct categories of stormwater discharges. 33 U.S.C. § 1342(p)(2). For these specific categories of discharges, NPDES permits were to be required. Phase II required the EPA to consider, over time, other stormwater discharges that had the potential to adversely affect water quality. 33 U.S.C. § 1342(p)(6).

Among the Phase I stormwater discharges to be regulated through the issuance of NPDES permits were those associated with "industrial activity." 33 U.S.C. § 1342(p)(2)(B). Despite the inclusion of this category, Congress provided the EPA with no definition of the term. Instead, EPA was directed to "establish regulations setting forth the permit application requirements for [such] stormwater discharges. . . ." 33 U.S.C. § 1342(p)(4)(A). The EPA's 1990 regulations defined a "storm water discharge associated with industrial activity" as a "discharge from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14) (2011). "Standard Industrial Classifications" or "SIC codes," as originated by the Office of Management and Budget, were used by the EPA to further designate the specific activities deemed to be industrial in nature.

The Ninth Circuit's error in effectively invalidating the Silvicultural Rule was compounded by its similar invalidation of the stormwater discharge rule. Again, the Ninth Circuit never conducted an *Auer* analysis of the stormwater discharge rule. Instead,

while recognizing that the text of the rule made clear that EPA intended to exclude discharges from activities defined by the Silvicultural Rule from the definition of industrial activity requiring a stormwater permit, it held that "the 1987 amendments to the CWA do not exempt from the NPDES permitting process stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels, and is then discharged into streams and rivers." (Pet. App. 47). Removing every last vestige of uncertainty that the Ninth Circuit invalidated the stormwater discharge rule too, the court further stated that "[w]e have just held that § 402(p) provides that stormwater runoff from logging roads that is collected in a system of ditches, culverts, and channels is a 'discharge associated with industrial activity,' and that such discharge is subject to the NPDES permitting process under Phase I." (Pet. App. 48). In reaching this conclusion, the Ninth Circuit did not wholly consider the EPA regulations at issue. If it had, the Ninth Circuit would have found SIC code 24 to be less-encompassing than interpreted. The EPA explained that the "[e]stablishments identified under SIC 24 . . . are engaged in operating sawmills, planing mills and other mills engaged in producing lumber and wood basic materials." 55 Fed. Reg. 47,990, 48,008 (Nov. 16, 1990). Logging, as opposed to these truly industrial activities, was to be addressed under different regulatory provisions altogether. *See* 40 C.F.R. § 122.27.

The EPA explained in its amicus brief filed with the district court that it had separated discharges associated with "industrial activity" from discharges associated with "silvicultural activity." It further distinguished between "silvicultural point sources" and discharges fitting within its existing Silvicultural Rule. The distinctions noted by EPA in its amicus brief were not plainly erroneous, inconsistent, nor in conflict with longstanding practice and were entitled to *Auer* deference, deference which the Ninth Circuit did not accord. The Ninth Circuit erred by invalidating the stormwater rule in a citizen suit. The regulatory structure for the management of forest roads adopted by EPA should be allowed to stand. The decision of the Ninth Circuit, on the other hand, should be reversed.

III. The Ninth Circuit's Decision Has Significant Consequences On Existing State BMP And NPDES Programs

A. The States' Best Management Practices

Forestry activities generally involve numerous small operations occurring sporadically over large amounts of space and long periods of time. Complicating the situation is the fact that different forests, even those in close proximity with one another, may have very different characteristics in terms of topography, tree species, soil types, wildlife habitat, geology and hydrology. In order to be effective, the approach to protecting the environment from forestry activities must be adapted to local conditions and circumstances.

Congress recognized that non-point source pollution is unique to each state when it added section 319 to the CWA in 1987. *See* 33 U.S.C. § 1329. Section 319 required states to develop plans for any non-point source activities that are causing a state's water to fall short of the state's respective water quality goals. *See* 33 U.S.C. § 1329. Together, sections 218 and 319 authorize the states to obtain federal funding to manage non-point source pollution, with oversight from EPA. 33 U.S.C. §§ 1298 & 1329. Amici States have followed Congressional and EPA directives.

Forestry practices in the United States are now conducted under the most comprehensive program of BMPs of any land use activity in the nation. Some Amici States employ mandatory[2] BMPs administered by state foresters or forest practice boards or commissions. National Council for Air and Stream Improvement, Inc., *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). Other Amici States employ non-regulatory BMPs[3] that are developed or approved by state agencies, with landowner education to encourage compliance,

---

[2] These sign-on states have mandatory BMP programs: Alaska Code 41.12.055(d) and the implementing regulation is 11 AAC 95.295; Idaho Code 38-1301 *et seq.*; Kentucky KRS 149.344; New Hampshire; Ohio Admin. Code § 1501:15-5-12 (2010); and South Carolina.

[3] These sign-on states have non-regulatory BMP programs: Arkansas, Alabama, Florida, Georgia, Maine, Michigan, Mississippi, Tennessee, Virginia, and Wyoming.

and authority for agencies to take action against landowners or foresters who do not comply. *See, e.g.*, Florida Division of Agriculture and Consumer Services, *Silvicultural Best Management Practices* (2008). BMPs vary among Amici States for good reason. A BMP that is appropriate for a coastal pine forest in Georgia may be wholly inadequate for a temperate rainforest in Oregon, or an Ozark mountain forest in Arkansas. But while individual BMPs may vary, the single goal of protecting the waters of the nation is served in consistent fashion. Indeed, in order to advance the laudatory goals of the CWA, the BMPs must, of necessity, be designed in response to local conditions.

In spite of their variations, Amici States' BMPs share a number of attributes because each state's BMPs are based upon a common set of science-based principles. National Council for Air and Stream Improvement, Inc. *Compendium of forestry best management practices for controlling nonpoint source pollution in North America*, Technical Bulletin No. 966 (2009). BMPs will generally be designed to 1) minimize soil compaction; 2) separate exposed soils from surface waters; 3) separate fertilizer and herbicide application from surface waters; 4) inhibit hydraulic connections between bare ground and surface waters; 5) provide forested buffers around watercourses; and 6) properly plan, locate, and design roads to have a minimal impact on soil erosion and water quality. R. Olszewski & C.R. Jackson *Best*

Management Practices and Water Quality, National Council for Air and Stream Improvement, Inc. (2006).

Regardless of each state's chosen approach, BMPs and non-point source pollution prevention programs implemented by Amici States are subject to EPA oversight and approval. *See* 33 U.S.C. § 1329. States whose water quality inventories fail to demonstrate continued improvement over time are subject to closer scrutiny and review by EPA, and poor performance can result in grant funding reductions. In short, BMPs have become an accepted, well-understood, documented, approved and successful method of protecting water quality in the United States and, in particular, in the nation's forests.

There are hundreds of millions of privately and publicly owned acres of forest land in the United States, with millions of miles of forest roads having some form of water conveyance, or channeling, associated with them that are currently managed by Amici States' BMP programs. A timber harvest does not occur overnight. Each site designated for timber harvesting and reforestation is the culmination of several years of multiple resource assessment and detailed project planning. Over the last three decades each Amici State has expended thousands of hours and millions of dollars developing and implementing their respective BMP programs. The states' BMP programs have been developed by certified silviculturists, and these individuals meet certain standards of professional knowledge, skills and experience in multiple-use silviculture activities. In order to meet

EPA standards, Amici States provide training and certification in soils and watershed management, and while these individual BMP specialists are knowledgeable regarding the practices and procedures necessary to comply with sections 218 and 319 of the CWA, they are often completely unfamiliar with the requirements of the CWA's NPDES program. A sudden shift to a fully regulated, permit-based approach to forest road management is a significant departure in how forest roads have been managed for decades under BMPs, and this permit-based approach will further burden state agencies that are already struggling with meeting the current demands of the NPDES program. If the Ninth Circuit decision in this case is not reversed by this Court, the states' established BMP programs will be vacated in favor of NPDES permits, and the burden of NPDES permitting is substantial.

B. The States' Individual NPDES Programs

Amici States are concerned about the chaos that will result at the state level if hundreds of thousands of applications for new NPDES permits related to forest roads are filed within a short timeframe. Since the inception of the NPDES program, the number of facilities required to have NPDES permits has quadrupled. *Protecting the Nation's Waters Through Effective NPDES Permits*, Office of Water, EPA-833-R-01-001, June 2001. This growth is the result of a number of changes to the program including the reauthorization of the CWA in 1987, which significantly

expanded the scope of the NPDES program. *Id.* Moreover, the NPDES permitting scheme is burdensome to administer. As specified in 40 C.F.R. § 124, there are a number of major steps the states' permit writers must follow to develop and issue an individual NPDES permit.

The NPDES permitting process begins when the permittee submits an application. After receiving the application and making a decision to proceed with the permit, the permit writer reviews the application for completeness and accuracy. When the application is complete, the permit writer, using the application data, begins to develop the draft permit and the justification for the permit conditions. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003. The first major step in the development process is deriving technology-based effluent limits. Following this step, the permit writer derives effluent limits that are protective of state water quality standards. The permit writer then compares the technology-based effluent limits with the water quality-based effluent limits and applies the more stringent limits in the permit. The decision-making process for deriving limits is documented in the permit fact sheet. Following the development of effluent limits, the permit writer develops appropriate monitoring and reporting conditions, develops facility-specific special conditions, and includes standard conditions that are the same for all permits. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental

Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003. After the draft permit is complete, the permitting authority provides an opportunity for public participation in the process. A public notice announces the permit and interested parties may submit comments regarding the draft permit. Based on the comments, the states then develop the final permit, with careful attention to documenting the process and decisions for the administrative record, and issue the final permit to the facility. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003.

The states' permit writers spend a majority of their time deriving appropriate effluent limits based on applicable technology-based and water quality-based standards. Water quality goals for a water body are defined by state water quality standards. A permit writer may find, by analyzing the effect of a discharge on the receiving water, that technology-based permit limits are not sufficiently stringent to meet these water quality standards. Permit writers must consider the impact of every proposed surface water discharge on the quality of the receiving water.

The CWA provides that NPDES permits may not be issued for a period of longer than five (5) years and the states already face a significant backlog of permit renewals. Permittees that wish to continue discharging beyond the five-year term must submit complete applications for permit renewal at least 180 days prior to the expiration dates of their permits. If the

state permitting authority receives a complete application, but does not reissue the permit prior to the expiration date, the existing permit is considered "administratively continued." Permits that have been administratively continued are considered to be "backlogged." Since 1999, EPA has tracked the issuance status (the number of NPDES permits and the percent current) and set goals for states and EPA Regions to achieve a current rate of ninety (90) percent. According to EPA, in December of 2009 only one EPA Region, Region 6, was at the 90-percent "current" status for major individual NPDES permits. Only two Regions, Region 5 and Region 6, met the current status for individual minor permits.

The Ninth Circuit's decision that channeled forestry roads require NPDES permits could not have come at a more inopportune time. While Amici States are being tasked with an ever-growing list of EPA initiatives, the supporting flow of federal and state dollars to fund these new government initiatives continues to diminish. *EPA FY 2012 Budget Hearing Before the Senate Interior, Environment and Related Agencies Subcommittee,* 112th Cong. (2011). Amici States have legitimate concerns about the overwhelming number of regulations they are facing from new EPA initiatives that are far outstripping the financial support received from EPA for implementation. Adding a new permit requirement for ditches and culverts along millions of miles of forest roads will swamp already burdened states at a time when resources to administer the NPDES permitting programs are

continuing to shrink and the states are continuing to fall behind.

C. NPDES General Permits Are Not The Solution

In contrast to the Ninth Circuit's suggestion, and a current EPA proposal, general permits are not the simple "cure" to the Ninth Circuit's decision in this case. In a recent Federal Register notice, EPA stated that it was considering regulating a subset of stormwater discharges from forest roads under its Phase II stormwater rulemaking authority. 77 Fed. Reg. at 30,349; *see* pp. 17-18. On May 23, 2012, EPA issued a formal notice in the Federal Register indicating its intent to consider "proposed revisions to its Phase I stormwater regulations (40 CFR 122.26) to specify that stormwater discharges from logging roads are not included in the definition of 'storm water discharge associated with industrial activity.'" 77 Fed. Reg. at 30,474. EPA's proposed revisions to its current regulatory scheme suggest that EPA intends to issue a new rule in the future that stormwater associated with forest logging roads be permitted pursuant to the Multi-Sector General Permit (MSGP) regulatory scheme, 73 Fed. Reg. 56,572 (Sept. 29, 2008). *See* Letter from Nancy K. Stonger, Acting Assistant Administrator, EPA, to Congressman Kurt Schrader (July 1, 2011). However, the MSGP is not a panacea to the Ninth Circuit's improper invalidation of EPA's Silvicultural and stormwater rules for two reasons. First, the MSGP is available only in states where EPA is the permitting authority. According to EPA,

forty-four (44) states and one territory are authorized to implement the NPDES program. *Protecting the Nation's Water Through Effective NPDES Permits*, EPA-833-R-01-001, June 2001. The overall burden of implementing and administering a general permitting scheme would, similar to the implementation of individual NPDES permits, rest with the states. But more importantly, although admittedly less onerous than administering the individual NPDES program, the issuance of a general permit is also not a simple undertaking. The process for developing and issuing a general NPDES permit requires a state's permitting authority to first identify the need for a general permit by collecting data demonstrating that a group, or category, of discharges has similarities that warrant a general permit. In this case, each state would have to conduct an inventory of the thousands, and in some instances millions, of miles of forest roads that may exist in each state. Once that inventory is complete, each state permitting authority would be required to consider the following to decide whether a general NPDES permit would be appropriate:

1. Are there a large number of facilities to be covered?

2. Do the facilities have similar production processes or activities?

3. Do the facilities generate similar pollutants?

4. Do only a small percentage of the facilities have the potential for violation of a state's water quality standards?

The remaining steps of the permitting process mirror those for individual NPDES permits. The permitting authority develops the draft permit and fact sheet, issues a public notice, addresses public comments, documents the issues for the administrative record, and issues the final permit. After the general permit has been issued, facilities that wish to be covered under the general permit generally submit a Notice of Intent to the state permitting authority. The permitting authority may then either request additional information describing the facility, notify the facility that it is covered by the general permit, or require the facility to apply for an individual NPDES permit. *U.S. EPA NPDES Permit Writers' Manual*; U.S. Environmental Protection Agency, Office of Water, December, 1996; EPA-833-B-96-003. The Ninth Circuit's suggestion and EPA's consideration of that suggestion, that general permits provide a simple solution to the Ninth Circuit's ill-reasoned decision to invalidate EPA's Silvicultural and stormwater rules is incorrect.

CONCLUSION

Based upon the above analysis, Amici States respectfully request this Court to reverse the Ninth Circuit.

Respectfully submitted,

DUSTIN MCDANIEL
Arkansas Attorney General
CHARLES L. MOULTON
ERIC B. ESTES
Senior Assistant
Attorneys General
KENDRA AKIN JONES*
Assistant Attorney General
**Counsel of Record*
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-7383

Attorneys for Amici States

September 4, 2012